In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 421

NASH MIAMI MOTORS, INC., AND SYDNEY GINSBERG, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Commissioner of Internal Revenue determined that petitioners (an individual and his family corporation) had understated their income for the years 1946–1948 and that part of these deficiencies were due to fraud (R. 1443–1445, 1463).[1] The Commissioner assessed deficiencies and fraud penalties. Petitioners filed petitions in the Tax Court asking for redeterminations of the proposed deficiencies and later challenged the constitutional power of the Tax Court to de-

[1] "R." references are the printed record in the court of appeals.

233-730—66

cide their case on the ground that all of the judges of that court are appointed for a term of years, rather than during good behavior as prescribed by Article III, Section 1, of the Constitution (R. 1331–1332, 1467). The Tax Court rejected this argument, holding that petitioners had waived their right to challenge its jurisdiction by voluntarily invoking it. On the merits, the Tax Court upheld the proposed deficiencies and additions for fraud (Pet. App. 22–66).

The Fifth Circuit affirmed the Tax Court (Pet. App. 11–17). It declined to dispose of the constitutional question on the ground of waiver, and held that, under the relevant Supreme Court decisions, the Tax Court could constitutionally adjudicate "claims against the United States" (*Ex parte Bakelite Corp.*, 279 U.S. 438, 452). The court of appeals stated, in part (Pet. App. 15–16):

> In waiving sovereign immunity and creating rights in individuals against the United States, Congress may provide "only an administrative remedy," or it may grant the claimant only a judicial remedy, or it "may give to the individual the option of either an administrative or a legal remedy." *Tutun* v. *United States*, 270 U.S. 568, 576–577; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 573.
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> As the Supreme Court recognized in *Flora* v. *United States*, 362 U.S. 145 (1960), Congress has given the taxpayer two possible remedies: In certain circumstances he may litigate in the Tax Court subject to review by the courts of appeals and by the Supreme Court; in certain other circumstances he may sue in

the district court or Court of Claims subject to appellate review. The real thrust of petitioners' complaint is simply that they would have preferred to litigate their case in the district court without first having paid the taxes. This equal protection type argument was also, we believe, disposed of by the rationale of *Willmut* [*Gas & Oil Co. v. Fly,* 322 F. 2d 301 (C.A. 5), certiorari denied, 375 U.S. 984]. Cf. *Flora* v. *United States,* 362 U.S. 145 (1960), at 175–177.

The instant petition is directed solely to the constitutional question. We submit that petitioners' contentions (Pet. 6–14) are without merit. As the Fifth Circuit pointed out (Pet. App. 13–14), this Court has long held that functions such as those performed by the Tax Court may be entrusted by Congress to legislative courts whose judges do not have Article III guarantees. *Ex Parte Bakelite Corp.,* 279 U.S. 438, 451–452. Moreover this Court considered and rejected a substantially identical challenge to the Tax Court's constitutionality last term when it denied a motion for leave to file a petition for mandamus in *Ginsberg* v. *Fulton,* 382 U.S. 805. The instant petitioners have had their proposed tax deficiencies reviewed by both the Tax Court and an Article III tribunal (the Court of Appeals for the Fifth Circuit) and have suffered no deprivation of their constitutional rights.[2]

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[2] Cf. *Heiner* v. *Diamond Alkali Co.,* 228 U.S. 502, 507; *Welch* v. *Obispo Oil Co.,* 301 U.S. 190, 193–196; *Williamsport Co.* v. *United States,* 277 U.S. 551, 561.

There is no conflict of decisions,[3] the result reached by the lower courts is correct, and no further review is warranted.

Respectfully submitted.

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OCTOBER 1966.

[3] Indeed both the Fourth Circuit (*Amos* v. *Commissioner*, 360 F. 2d 358, 359) and the Seventh Circuit (*Martin* v. *Commissioner*, 358 F. 2d 63, 64) have recently rejected similar attacks upon the Tax Court's constitutionality.

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